R. C. Cussen, Deputy Legal Adviser for respondent.

Cur. Ad. Vult.

TERRELL, AG. C.J.—The only question that arises on the appeal is whether the defendants are carrying on 'life assurance business' within the meaning of section 3 (1) of the Life Assurance Companies Enactment, 1924. If they are doing so they are bound to make a deposit under section 4 (1), and failure to make such deposit renders them liable to penalties under section 29 (1).

In section 2 'life assurance business' and 'policy of assurance of human life' are defined as follows:—

> "Life assurance business" means the issue of or the undertaking of liability under policies of assurance upon human life, or the granting of annuities upon human life.
>
> "Policy of assurance upon human life" means any instrument by which the payment of money is assured on death (except death by accident only) or the happening of any contingency dependent on human life, or any instrument evidencing a contract which is subject to payment of premiums for a term dependent on human life.

The appellants' argument was twofold:—

(1) that the certificate Exhibit R2 was not a policy of insurance but only evidence of a contract and

(2) that the contract was not "subject to payment of premiums for a term dependent on human life" because after twenty years the payment would cease.

As to the first point Mr. Shearn argued that exhibit Q was an offer and that the acceptance was the entry in the register, and the certificate of membership Exhibit R2 was really superfluous and at the most evidence of a pre-existing contract. I do not think this argument is sound. It appears to me that Exhibit R2 is definitely the acceptance and is "the instrument by which the payment of of money is assured on death." It says so in so many words. Exhibit R2 certifies that the assured's nominee "will be paid a death benefit under the rules terms and conditions of this scheme." It is a contract containing an undertaking by the Company. On looking at the rules we find that by Rule 32 the Company guarantees the payment of "100% profits over and above the subscription paid by the member."

Mr. Shearn argued that as regards death benefit Rule 32 was meaningless and unenforceable. Such an argument is not open to the defendants. The guarantee is introduced to attract members and the defendants will not be permitted to argue that the supposed benefits provided by the guarantee are nugatory just as a company cannot in such a case set up that any illegality attaches to the policies which it has issued (see judgment of Phillimore, L. J. in *Hampton* v. *Toxteth Co-operative Provident Society Limited*, 1915, 1 Chancery at page 738).

I think therefore that Exhibit R2 is a policy within the first part of the definition.

In any case I consider that it is "an instrument evidencing a contract which is subject to payment of premiums for a term dependent on human life." The premiums cease to be payable on death and therefore the payment is dependent on human life and none the less so because in this as in the policies of many insurance companies, premiums cease to be payable after a fixed period if death has not ensued.

The case of *Hampton* v. *Toxteth Co-operative Provident Society Limited*, 1915, 1 Chancery, page 721 does not assist the appellants. At page 732 the grounds upon which Cozens-Hardy, M. R. decides that the company was not carrying on life assurance business are specified. He says:—

> "No policy has been issued, no premium has been paid, there is no obligation upon the society to appropriate any further sum to the insurance fund."

The elements which are lacking in the case cited are all present in the case now under appeal.

As regards sentence I agree with the sentence inflicted by the learned Magistrate.

The appeal will be dismissed.

Appeal dismissed.

[APPELLATE CRIMINAL JURISDICTION]

TERRELL, Ag. C.J., MCFALL, J.

August, 8, 1933.

KURUP .. .. .. **Appellant.**

vs.

PUBLIC PROSECUTOR .. **Respondent.**

[PERAK CRIMINAL APPEAL No. 10 OF 1933]

Criminal Procedure Code, 1926, Section 112, 113 as amended by the Criminal Procedure Code (Amendment) Enactment, 1932—Statement by an accused person to the police—Evidence Ordinance, sections 3, 80, 155(c)—Proof of such statement—Meaning of "evidence" in section 3.

A statement by an accused person to the police can only be used to impeach his credit under section 113 (ii) of the Criminal Procedure Code, 1926, after it has been proved, and since such a statement does not fall within the definition of "evidence" in section 3 of the Evidence Ordinance, it cannot be admitted under section 80 without being proved.

If such a statement has been admitted under the provisions of section 113 (ii) of the Criminal Procedure Code, it may be put in evidence, notwithstanding that it amounts to a confession, and that it would otherwise be inadmissible under section 26 of the Evidence Ordinance.

Appellant in person.

L. C. Simpson-Gray, Deputy Public Prosecutor for the respondent.

TERRELL, ACTING C. J.—The accused had been convicted by Gerahty J. under section 326 of the Penal Code and sentenced to two years rigorous imprisonment, and in addition was ordered to pay $250/- compensation to the complainant. An appeal was preferred to the Court of Appeal, and the appeal was heard at Ipoh on the 8th August 1933.

A question arose as to whether a statement made by the accused to a Police Officer should have

been admitted in evidence and as to whether it required to be proved and whether it had been properly proved.

The Court was of opinion that whatever their decision was on these points there was ample evidence to justify the conviction, and the appeal was accordingly dismissed.

As regards the accused's statement the evidence on the subject was as follows:—

> "XXnd. I deny that I ever struck first witness with a knife on 1-12-32 and that I had a knife at all. On 2nd December 1932 I made a statement to Raja Yahaya, O.C.P.D.
>
> D.P.P. applies for leave to refer to that statement.
>
> Leave granted.
>
> D.P.P. refers to section 80 Evidence Enactment.
>
> I admit the statement without further proof—put in and marked "C."
>
> (Note. Raja Yahaya and D.P.C. 37 are available in Court to prove the statement).
>
> On 2nd December, 1932, I said to Inspector that I pulled out my knife and stabbed him because I denied it to the Inspector at first. But the Inspector insisted that I had stabbed and therefore I had to give in.
>
> I never said 'I pulled him by the hair too and kept on stabbing him. He did not retaliate.'
>
> I never said I threw the knife away not far away from the scene."

The relevant sections of the Criminal Procedure Code are section 112(i) and (ii) and section 113(i) and (ii) (as amended by Enactment 33-32). They are as follows:—

> "112. (i) A police officer making a police investigation under this Chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case and shall reduce into writing any statement made by the person so examined.
>
> (ii) Such person shall be bound to answer truly all questions relating to such case put to him by such officer other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.
>
> 113. (i) No statement made by any person to a police officer in the course of a police investigation made under this Chapter shall be signed by the person making it, nor shall such statement, save as herein provided, be used as evidence.
>
> (ii) When any witness is called for the prosecution or for the defence, including the accused if he tenders himself as a witness in his own defence, the Court shall on the request of the accused or the prosecutor refer to any statement made by such witness to a police officer in the course of a police investigation under this Chapter and may then, if the Court thinks it expedient in the interests of justice, direct the accused to be furnished with a copy thereof; and such statement may, notwithstanding the provisions elsewhere contained in the Straits Settlements Evidence Ordinance, 1893, be used to impeach the credit of such witness in the manner provided by the said Ordinance."

It will be seen that if the Court considers it expedient in the interests of justice "the statement may be used to impeach the credit" of the accused in the manner provided by the Evidence Ordinance: section 155(c) of that Ordinance provides that the credit of a witness,—in this case the accused—may be impeached "by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted."

It follows that in order to impeach his credit the statement has to be proved. The learned trial Judge held that the statement proved itself under section 80. Section 80 makes certain presumptions as to documents therein specified. The presumptions with regard to this particular document would be

(a) that the document is genuine, i.e. that it is the actual statement recorded by by the Police Officer mentioned in the statement.

(b) that the statements as to the circumstances under which it was taken are true, i.e. as to the time and place of the statement and the name of the person whose statement it is supposed to be,

(c) that it was duly taken, i.e. that the provisions of section 112 of the Criminal Procedure Code have been complied with.

Before however these presumptions arise it would have to be shewn that this particular statement was a document purporting to be a statement of an accused person taken in accordance with law and purporting to be signed by an officer authorised by law to take evidence in a judicial proceeding.

It will be observed that under section 112 the Police Officer has to record in writing any statement made in the course of a police investigation and that the person making the statement is bound to answer truly unless his answer would expose him to criminal proceedings.

I feel some doubt however whether such a statement could properly be called 'evidence.' By virtue of the second explanation to section 193 of the Penal Code, a police investigation is for the purpose of that section regarded as a stage of a judicial proceeding. I do not think that this provision carries the matter far enough. To begin with a definition of what is "false evidence" for the purpose of section 193 of the Penal Code cannot properly be used to explain or amplify the meaning of the word "evidence" in another section of a different Ordinance. Evidence is defined in the Evidence Ordinance itself (section 3) to include a statement which the Court requires to be made before it by witnesses and a statement made before a Police Officer is certainly not a statement made before a Court. I think therefore that the presumptions under section 80 do not arise, and accordingly that the statement in this case had never been proved and was improperly admitted. Even if the presumption under section 80 had arisen no evidence was called to the effect that the accused was the person who made the statement. A mere similarity of name

—'*Kurup*' in the charge, and '*Kanan Kurup*' in the statement—is certainly not sufficient.

It is true that the learned trial Judge records that the Police Officer and the detective who acted as interpreter were present and could have been called but this is not sufficient. A Criminal Court can however only proceed on the evidence actually called; not on the evidence which might have been called, and even an admission will not relieve the prosecution of proving necessary facts.

If however the statement had been proved it would have been properly admitted in evidence, and its effect would have been that of a confession, as in his statement the accused admitted the stabbing which in his sworn evidence he denied. In British India the accused cannot give evidence at all. In England as in the Federated Malay States the accused is a competent witness, but in England a statement made to a police officer can only be given in evidence if the accused has been previously cautioned. Section 112 of the Federated Malay States Criminal Procedure Code does not require any caution, nor need the accused be warned that he is under no obligation to give answers which might incriminate him. That was logical enough when such statement was absolutely inadmissible under section 113(i), The only admissible statements by accused persons were those that had been made in accordance with the provisions of sections 24, 25, 26, 28 and 29 of the Evidence Ordinance and sections 114 and 115 of the Criminal Procedure Code and were subject to the very substantial safeguards thereby provided.

The effect then of the 1932 amendment of section 113(ii) of the Criminal Procedure Code is that if the accused elects to go into the witness box, the prosecution may, with the consent of the Court, adduce in evidence an unsigned and unsworn statement of the accused which may well have been made as the result of inducements, threats or promises but which will have all the force of a confession. It has been suggested that it was only intended by section 113(ii) to make a statement admissible if it were made before the accused was arrested, but provided that it is made in the course of a police investigation the code makes no distinction between the case of a person under arrest and of one who is not. In this particular case the accused was actually under arrest when the statement was made. In view of this provision it is clearly dangerous for an accused person to elect to give evidence on oath if he has made a previous statement, and his statutory right to give such evidence is gravely prejudiced. It is to be observed that the new section is drawn entirely in the interests of the prosecution. It may well be that when the defence is an alibi it would greatly assist the credibility of such defence if the accused could show that he had set up the defence at the earliest opportunity, namely in the course of the police investigation: but the section is so drawn that the statement can only be used to impeach the accused's credit and never to corroborate him.

MUDIE, J.—In the course of this appeal the question has arisen as to the admissibility under section 113 (ii) of the Criminal Procedure Code, 1926, as amended by section 6 of the Criminal Procedure Code (Amendment) Enactment, 1932, of a statement made by the accused to a police officer in the course of a police investigation.

The statement in this case amounts to a confession, and before the section was amended, would have been inadmissible under section 25 of the Evidence Ordinance. The amending Enactment provides:—

> "——— and such statement may, notwithstanding the provisions elsewhere contained in the Straits Settlements Evidence Ordinance, 1893, be used to impeach the credit of such witness in the manner provided by the said Ordinance."

If the provisions of section 145 of the Evidence Ordinance are observed, the statement made to the police officer may be proved under section 155 of the Evidence Ordinance in order to impeach the accused's credit. It is not admissible as proof of the averments made therein. But how the Court is to consider the statement as impeaching the accused's credit and at the same time to disregard it as a confession passes the wit of man to understand.

A further point arises, namely, whether the statement is admissible without proof under Section 80 of the Evidence Ordinance. In my opinion it is not, because the statement, before it is admitted by a Court, is not evidence, and the Police Officer is not an officer authorised by law to take evidence. The definition of "Evidence" and "Court" in Section 3 of the Evidence Ordinance shows that evidence is the testimony of witnesses in a Court or before a person legally authorised to take evidence.

It was contended by the learned Deputy Public Prosecutor that the word "evidence" in Section 80 of the Evidence Ordinance has the same meaning as in Section 193 of the Penal Code where the words "judicial proceeding" are extended by express words to include an investigation directed by law preliminary to a proceeding before a Court of Justice, and the word "evidence" has a correspondingly extended meaning. As there is nothing in Section 80 of the Evidence Ordinance to extend the meaning of the word beyond the limits of its definition in Section 3, in my view it does not extend to a statement made to a police officer in the course of a police investigation.

The statement must, therefore, be proved before it can be admitted in evidence.

MCFALL, J.—The appellant Kurup was convicted before the Supreme Court at Ipoh for voluntarily causing grievous hurt with a knife to one Varathappan at Ayer Tawar village in lower Perak on the 1st December 1932.

The appellant stabbed Varathappan about 4 p.m., and was arrested about 5 p.m. on 1st December, 1932. Raja Yahaya, the officer in charge of the police district, recorded a statement in the course of the investigation of the case from

the appellant who was then under arrest at 12.50 p.m. on the 2nd December, 1932.

At the trial, before Gerahty, J., the appellant tendered himself as a witness in his own defence. The record of his cross-examination by the Deputy Public Prosecutor is as follows:—

"XXnd. I deny that I ever struck first witness with a knife on 1-12-32 and that I had a knife at all. On 2nd December, 1932 I made a statement to Raja Yahaya, O.C.P.D.

D.P.P. applies for leave to refer to that statement.

Leave granted.

D.P.P. refers to Section 80 Evidence Enactment.

I admit the statement without further proof—put in and marked "C."

(Note. Raja Yahaya and D.P.C. 37 are available in Court to prove the statement).

On 2nd December, 1932, I said to Inspector that I pulled out my knife and stabbed him because I denied it to the Inspector at first, but the Inspector insisted that I had stabbed and therefore I had to give in.

I never said 'I pulled him by the hair too and kept on stabbing him. He did not retaliate.'

I never said I threw the knife away not far away from the scene."

Appellant was convicted and appealed on the ground that he was innocent.

At the hearing of the appeal the Court called upon the Deputy Public Prosecutor to support the admission of the statement, marked Exhibit C, in evidence.

The Deputy Public Prosecutor referred to sections 112, 113 Criminal Procedure Code, and sections 80, 145 and 155 of the Evidence Ordinance and to section 193, Penal Code.

The statement marked Exhibit "C" was headed in Romanized Malay "Perchakapan Dalam Permereksaan" meaning "statement in investigation." It was recorded and signed by Raja Yahaya, the officer in charge of the police district, and interpreted by detective police constable 37. In Exhibit "C" the appellant is recorded to have stated *inter alia* as follows:—

"At about 4.30 p.m. I strolled along the 5' way of the shop-house there: when I arrived in front of shop No. 75 (a Tamil sundry shop), I met the complainant alone. I was alone too then. He scolded me and I scolded him in return. He appeared slightly drunk and I was drunk too. I had some liquor in a Chinese shop. He caught hold of my hairs with his right hand and my throat with his other hand. I could not stand his grip round my neck and so I pulled out my knife from my belt and stabbed him with it several times on the back. I pulled him by the hair too and kept on stabbing him. He did not retaliate. I stabbed him on the back because he did not let go my neck. He only let go my neck after I have stabbed him twice. He fell down on the plank bridge in front of the same shop: I did not stab him after he had fallen down. The knife found by the Police is the knife I stabbed him with. Many people came and I went away leaving him bleeding on the said bridge. I did not make any attempt to run: I was arrested by three policemen. I threw the knife away not far away from the scene (identified knife produced by me at Police Station)."

The statement Exhibit "C" was recorded by virtue of section 112 and brought before the Court under section 113 sub-section (ii) of the Criminal Procedure Code. The sections read as follows:—

"112. (i) A police officer making a police investigation under this chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case and shall reduce into writing any statement made by the person so examined.

(ii) Such person shall be bound to answer truly all questions relating to such case put to him by such officer other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

113. (i) No statement made by any person to a police officer in the course of a police investigation made under this Chapter shall be signed by the person making it, nor shall such statement, save as herein provided, be used as evidence.

(ii) When any witness is called for the prosecution or for the defence, including the accused if he tenders himself as a witness in his own defence, the Court shall on the request of the accused or the prosecutor refer to any statement made by such witness to a police officer in the course of a police investigation under this chapter and may then, if the Court thinks it expedient in the interests of justice, direct the accused to be furnished with a copy thereof; and such statement may, notwithstanding the provisions elsewhere contained in the Straits Settlements Evidence Ordinance, 1893, be used to impeach the credit of such witness in the manner provided by the said Ordinance."

On examining section 113, sub-section (ii), it is clear that the statement recorded under section 112 can be used in two ways, and in two ways only, first the Court in certain circumstances shall refer to it, and secondly the statement may be used to impeach the credit of the witness who made it.

Now what is meant by the words in section 113 sub-section (ii) "the Court shall on request of the.....under this chapter?" The word "refer" has several shades of meaning, but here it is used in the sense of refer for information as to a dictionary or a clock. For such a purpose the production of the statement to the Court by the prosecutor is sufficient to enable the Court to refer to the statement. The Court then looks at the statement and may, if the Court thinks it expedient in the interests of justice, direct the accused to be furnished with a copy thereof. At this stage the statement has not been proved. The Court has the statement available for examination of the witness, but the statement is not in evidence, cannot be marked as being in evidence, and cannot be used by the Court as

evidence to assist in arriving at a decision. The meaning of the word "refer" in this sense is illustrated by its use in two sections 162 and 172 of the Code of Criminal Procedure in India which reads as follows:—

> "162. (i) No statement made by any person to a police officer in the course of an investigation under this Chapter shall, if reduced into writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at an inquiry or trial in respect of any offence under investigation at the time when such statement was made:
>
> Provided that, when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, the Court shall, on the request of the accused, refer to such writing and direct that the accused be furnished with a copy thereof, in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872. Where any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.
>
> 172. (1) Every police officer making an investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through this investigation.
>
> (2) Any Criminal Court may send for the police diaries of a case under inquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial. Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court; but if they are used by the police officer who made them, to refresh his memory, or if the Court uses them for the purpose of contradicting such police officer, the provisions of the Indian Evidence Act, 1872, section 161 or section 145, as the case may be, shall apply."

The last part of section 113, sub-section (ii) "and such statement.....ordinance" allows the use of the statement in the second way, that is to impeach the credit of the witness who made it in manner provided by the Evidence Ordinance. That manner is laid down at section 155, clause (c) of the Evidence Ordinance as follows:—

> "The credit of a witness may be impeached in the following ways by the adverse party or, with the consent of the Court, by the party who calls him:—
>
> (c) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted."

To impeach the witness's credit, therefore, his inconsistent statement must be proved. As the statement now in question was required by section 112 to be reduced to writing, the writing is the only evidence admissible to prove this statement; but the writing by itself cannot prove that the accused was the person who made this statement therein contained. That fact must proved by the evidence of the officer who examined the accused and reduced the statement to writing, or by the interpreter, or by some other means. In this trial the writing was admitted in evidence and marked without proof that it was the accused who made the statement contained in the writing though the prosecutor had the witnesses necessary to prove that fact in attendance. Section 80 Evidence Ordinance contains no presumption which will rectify that omission.

It may be objected that the statement Exhibit "C" amounts to a confession made by an accused person to a police officer while in custody, and that such a statement is absolutely inadmissible in evidence by virtue of section 26 Evidence Ordinance. The answer is that this statement may amount to a confession yet the words "notwithstanding the provisions elsewhere contained in the Straits Settlements Evidence Ordinance 1893" in section 113, sub-section (ii) the exclusion of sections 25 and 26 Evidence Ordinance from section 113, sub-section (iii), and the trend of the amendment of section 113 (ii) in Enactment 22/26 by section 6 of Enactment 33/32 are three reasons for holding that the legislature contemplated and provided that section 26 Evidence Ordinance must yield to section 113 Criminal Procedure Code on this particular point.

I am therefore of opinion that the statement of the accused was wrongly admitted in evidence and marked Exhibit "C" in this case. Apart, however, from the statement there was ample evidence to prove the charge against the accused, and the admission of the statement in evidence has worked no injustice to him. I therefore concurred that this appeal should be dismissed, and the conviction and sentence affirmed.

Appeal dismissed.

[ORIGINAL CIVIL JURISDICTION]

TERRELL, Ag. C. J.

August 4, 1933.

IN RE THE ESTATE AND EFFECTS OF THOMAS ALBERT DUFFY, DECEASED.

[SELANGOR PROBATE No. 75 of 1933]

Probate and Administration Enactment, 1920, sections 5, 6, and 39—Probate—Will proved Abroad—Probate of Copy.

The deceased died leaving a will whereby he appointed two executors, one resident in Australia and the other in the Federated Malay States. The original will was proved in Australia, and, in accordance with the provisions of law, the original will was deposited in the Supreme Court of New South Wales.

The executor residing in the Federated Malay States obtained a properly authenticated copy of the will and applied for probate of such copy.

Held, that there is no provision in the Probate and Administration Enactment, 1920, empowering the Court to grant absolute probate of a copy of a will, but probate can be granted under section 39 limited until such time as the original will is produced.

V. Mackie for the petitioner.

Cur. Ad. Vult.

TERRELL, AG. C.J.—The deceased T. A. Duffy died leaving a will whereby he appointed the Perpetual Trustee Company (Ltd.) and the petitioner executors. The original will was proved by the Perpetual Trustee Company in Australia, and in accordance with the provisions of